Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

Nos. 96-843, 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS FIRST NATIONAL BANK AND TRUST CO., ET AL., IN OPPOSITION

LOUIS R. COHEN
Counsel of Record
MICHAEL S. HELFER
CHRISTOPHER R. LIPSETT
ERIC MOGILNICKI
LEON B. GREENFIELD
JEFFREY S. JACOBSON
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Of Counsel
JOHN J. GILL III
MICHAEL F. CROTTY
American Bankers Association
1120 Connecticut Ave., N.W.
Washington, D.C. 20037
(202) 663-5026

December 30, 1996

31 pp

QUESTIONS PRESENTED

1. Whether banks that compete for customers against federal credit unions, and their trade association, have standing to challenge decisions of the National Credit Union Administration permitting federal credit unions to expand their fields of membership in violation of the "common bond" requirement of the Federal Credit Union Act, 12 U.S.C. § 1759.

2. Whether the "common bond" requirement is violated when an "occupational" federal credit union accepts members who have no "common bond of occupation" with the existing membership.

TABLE OF CONTENTS

Page

Statement 2

Argument 10

I. The Court of Appeals Decision on Standing Was a Straightforward and Correct Application of this Court's Decisions. 10

II. The Court of Appeals' Interpretation of the Common Bond Requirement Was Dictated by "Traditional Tools of Statutory Construction," Was Correct, Presents No Conflict with Other Circuits, and Resolves a Construction Question Unique to this Statute and of No Wider Importance. . 14

Conclusion 20

Appendix A 1a

Appendix B 4a

TABLE OF AUTHORITIES

Page

Cases:

AT&T Family Federal Credit Union v. First National Bank & Trust Co., 510 U.S. 907 (1993) 3, 8
Adams v. Watson, 10 F 3d 915 (1st Cir. 1993) 12
Air Courier Conference of America v. American Postal Workers Unions, AFL-CIO, 498 U.S. 517 (1991) ... 14
Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) 10
Association of Data Processing Services Organizations v. Camp, 397 U.S. 150 (1970) 8, 10
Board of Directors and Officers, Forbes Federal Credit Union v. NCUA, 477 F.2d 777 (10th Cir.), cert. denied, 414 U.S. 924 (1973) 5
Board of Governors v. Dimension Financial Corp., 474 U.S. 361, (1986) 15, 16
Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987) 13
Cabell Huntington Hospital, Inc. v. Shalala, No. 95-3095, 1996 WL 682215 (4th Cir. Nov. 27, 1996) 17
Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) 14, 15
Clarke v. Securities Industry Association, 479 U.S. 388 (1987) ..... passim
Community First Bank v. NCUA, 41 F.3d 1050 (6th Cir. 1994) 12
Control Data Corp. v. Balrige, 655 F.2d 283 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981) 13
DeLoss v. Department of Housing and Urban Development, 822 F.2d 1460 (8th Cir. 1987) 12
Dole v. United Steelworkers of America, 494 U.S. 26, (1990) 14
Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms, 860 F.2d 229 (7th Cir. 1988) 12

Cases—Continued:

Hazardous Waste Treatment Council v. Thomas 885 F.2d 918 (D.C. Cir. 1989) 8, 13
Hernandez v. Reno, 91 F.3d 776 (5th Cir. 1996) 17
Immigration and Naturalization Services v. Cardoza-Fonseca, 480 U.S. 421 (1987) 17
Investment Co. Institute v. Camp, 401 U.S. 617 (1971) ..... passim
L.P. Cavett Co. v. United States Department of Labor, No. 95-3902, 1996 WL 688966 (6th Cir. Dec. 3 1996) 17
Legacy Emanuel Hospital and Health Center v. Shalala, 97 F.3d 1261 (9th Cir. 1996) 17
Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 18
NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995) 12, 16
Scheduled Airline Traffic Offices v. Department of Defense, 87 F.3d 1356 (D.C. Cir. 1996) 12
Smiley v. Citibank (South Dakota), N.A., __ U.S. __, 116 S. Ct. 1730 (1996) 16, 17

Statutes:

The Federal Credit Union Act, 12 U.S.C. § 1751 et seq. 2
12 U.S.C. § 1759 2
12 U.S.C. § 1768 3
12 U.S.C. § 1770 3
12 U.S.C. § 1771 18
12 U.S.C. § 2902 3

Legislative Materials:

77 Cong. Rec. 3206 (1933) 4
Credit Unions: Hearings on S. 1639, S. 1640, and S. 1641 Before a Subcommittee of the Senate Committee on Banking and Currency 73d Cong., 1st Sess. 15 (1933) 5
S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) 4

Miscellaneous:

Studies in Federal Credit Union Chartering Policy § 1 (July 1979) 4
Department of Health, Education and Welfare, "Organizing a Federal Credit Union" (May 1967) 5
45 Fed. Reg. 8285 (1980) 4, 15
47 Fed. Reg. 16,775, 26,808 (1982) 3, 6
Interpretive Regulation and Policy Statement 94-1, 59 Fed. Reg. 29,066 (1994) 6
61 Fed. Reg. 59,305 (1996) 10

In the Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-843, 96-847

NATIONAL CREDIT UNION ADMINISTRATION,

Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,

Respondents.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,

Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS FIRST NATIONAL BANK AND TRUST CO., ET AL., IN OPPOSITION

STATEMENT [1]

The Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.*, governs the chartering and regulation of federal credit unions and delegates regulatory authority to the National Credit Union Administration ("NCUA"). Section 109 of the FCUA, 12 U.S.C. § 1759, provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." This case concerns federal credit unions claiming a "common bond of occupation."

For nearly fifty years, the NCUA and predecessor agencies interpreted this requirement to mean that all the members of any one "occupational" federal credit union must share a single "common bond of occupation." In 1982, the NCUA altered this interpretation and began approving applications by occupational federal credit unions to serve groups of people who do not share "a common bond" with the existing members. The NCUA stated in substance that, since the Act speaks of "groups [plural] having a common bond," a single credit union may serve several groups, each with its own bond,

---

[1] Pursuant to Rule 29.6, the parents and subsidiaries (except wholly-owned subsidiaries) of the respondents are as follows:

The parent company of respondent First National Bank and Trust Company is FNB Corp. The parent company of respondent Lexington State Bank is LSB Bancshares, Inc. Neither of these respondents has subsidiaries other than wholly-owned subsidiaries. Respondent Randolph Bank and Trust Company has no parent; Corporate Data Services, Inc. is its only subsidiary (other than wholly-owned subsidiaries). Respondent American Bankers Association has no parent companies or subsidiaries (other than wholly-owned subsidiaries). United Carolina Bank is the successor to the original plaintiffs Piedmont State Bank and Bankers Trust of North Carolina. Its parent company is United Carolina Bancshares Corp. It has no subsidiaries that are not wholly-owned.

and need not limit its membership to people sharing "a [single] common bond." 47 Fed. Reg. 16,775 and 26,808 (1982).

Respondents filed this suit in 1990, alleging that these NCUA approvals of credit union expansions violated the common bond requirement. The district court dismissed for lack of "prudential" standing, but the court of appeals reversed and this Court denied certiorari. Pet. App. 15a,[2] *cert. denied sub nom. AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). On remand, the district court ruled for the defendants, but the court of appeals again reversed, holding that (1) "the intent of the Congress is clearly discernible from the statutory text and the purpose of the statute"; and (2) Congress intended that "all the members of a credit union [must] share a single common bond." Pet. App. 6a, 10a.

1. The Federal Credit Union Act became law on June 26, 1934. Then and since, Congress has bestowed on federal credit unions certain advantages not enjoyed by their commercial bank competitors. *See, e.g.*, 12 U.S.C. § 1768 (exempting credit unions from taxation); 12 U.S.C. § 2902 (exempting credit unions from the Community Reinvestment Act); 12 U.S.C. § 1770 (allotting space in federal buildings to credit unions serving federal employees). But Section 109 of the FCUA imposes an important restriction on federal credit union activity: in pertinent part, it limits federal credit union membership to "groups having a common bond of occupation."

There was an express reason for this requirement. Credit unions were designed to be cooperatives, owned and managed by their members, that would enable persons of limited

---

[2] All citations to "Pet. App." refer to NCUA Pet., No. 96-843.

resources to pool their funds for saving and lending among themselves.[3/] As the Senate Report on the Act stated,

> A credit union is a cooperative society, organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, limited in *each* case to the members of a specific group with *a* common bond of occupation or association.[4/]

This common bond, the NCUA has explained, "is the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8285 (1980). The NCUA thus ruled that an occupational credit union could serve more than one "group" (*e.g.*, the employees of each of several affiliated companies), but all members had to share the same "common bond" (*i.e.*, the same corporate family). *Id.* As NCUA's predecessor agency explained:

> Common bond is that pre-existing condition which causes the members of a group to associate together, to know each other, to have common interests and purposes, and to be able and willing to work together to accomplish group

---

[3/] *See generally* NCUA, Studies in Federal Credit Union Chartering Policy § 1 (July 1979), C.A. App. 476.

[4/] S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis added), C.A. App. 52. At the introduction of S. 1639, which ultimately became the Act, Senator Sheppard proffered an accompanying statement that described a credit union as "organized within and in each case limited to *a specific group of people*. . . . No one outside the specific group can have anything to do with the specific credit union." 77 Cong. Rec. 3206 (1933) (emphasis added).

> objectives. A group has a common bond when it is composed of people who have the same employer, or are otherwise associated through some common interest or enterprise, and are so situated in relation to each other as a consequence of that community of employment or association that they could be expected to operate effectively as a cooperative organization for credit union purposes.[5/]

Credit unions are not necessarily required to be small institutions, but they are required to define their membership by the common bond. As the drafter of the model act on which the FCUA was based told Congress:

> [A] credit union first, as I have said, is a bank organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. *It is, however, confined to employees of the New England Telephone & Telegraph Co.*[6/]

In 1982, however, the NCUA revised its field of membership policy. Under the new rules, a single federal credit union may serve members of an unlimited number of occupational

---

[5/] Department of Health, Educ., and Welfare, "Organizing a Federal Credit Union" 3 (May 1967); *quoted in Board of Directors and Officers, Forbes Federal Credit Union v. NCUA*, 477 F.2d 777, 783 (10th Cir.), *cert. denied*, 414 U.S. 924 (1973).

[6/] *Credit Unions: Hearings on S. 1639, S. 1640, and S. 1641 Before a Subcomm. of the Sen. Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (emphasis added) (statement of Roy F. Bergengren); *see* NCUA Pet. 24 (eliding the last sentence quoted above).

groups, and the members of one group need not have anything in common with the members of another. 47 Fed. Reg. 16,775 and 26,808 (1982) *See* NCUA Interpretive Regulation and Policy Statement (IRPS) *94-1*, 59 Fed. Reg. 29,066, 29,075-76 (1994).

The change is dramatic: any single federal credit union could, without violating the NCUA's current interpretation of the common bond requirement, serve every person in the United States who is employed (and, by virtue of other NCUA interpretations, every family member of every employed person).[2/]

2. One credit union that took advantage of the new policy was AT&T Family Federal Credit Union ("ATTF") in North Carolina. ATTF was chartered in 1952 with a field of membership limited to "Employees of the Radio Shops of Western Electric Co., Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." The people within this field of membership shared the common bond of occupation (namely, employment by Radio Shops) required by the FCUA.

Pursuant to the NCUA's revised policy, ATTF later began serving customers not employed by AT&T, including employees of a Coca Cola bottler, Black & Decker Corp., Duke

---

2/ *See* 59 Fed. Reg. 29,066, 29,079 (1994) (family members of those within common bond eligible for credit union membership). The NCUA's regulations recognize that it may not permit a credit union to be established with a membership defined generally to include employees of all firms, because there is "[n]ot the same occupational bond" among them all. 59 Fed. Reg. at 29,076 (1994). However, the NCUA would deem the same membership to be eligible for a "multiple group charter" if it were defined by listing the "names of firms," *e.g.*, ABC Inc., DEF, Inc., GHI, Inc., *etc. Id.*

Power Co., and American Tobacco Co. ATTF also became a multi-state operation, serving its customers ("members," in credit union parlance) with branches in many states. At the time of the decision below, ATTF had "112,000 members in more than 150 disparate occupational groups spread across all 50 states." Pet. App. 4a-5a.

3. Respondents are four North Carolina banks and the American Bankers Association (a national trade association for banks). In 1990, respondents filed suit against the NCUA in the U.S. District Court for the District of Columbia, alleging that the multiple-bond policy is contrary to the FCUA, and asking specifically that recent NCUA approvals of expansion requests by ATTF be set aside as "arbitrary, capricious, or otherwise in violation of law."

In 1991, the district court dismissed, ruling that, although respondents had constitutional standing, they lacked "prudential standing." Pet. App. 32a-42a. The court of appeals reversed. It agreed that there was no issue of constitutional standing ("that [respondents] will suffer competitive or economic injury is not in doubt," Pet. App. 20a), and it held that respondents satisfied the requirements for prudential standing as well. Pet. App. 15a-31a.

The court of appeals noted that the common bond requirement is a congressionally imposed limit on credit union activity: "Like more classic entry restrictions, the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market." *Id.* 24a-25a. The court then held that, under this Court's precedents, competitors have standing to enforce such a limit. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, (1971) *("ICI")*; and *Association of Data Processing*

Servs. Orgs. v. Camp, 397 U.S. 150, (1970). The court of appeals read these cases as standing for "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. 24a.[8/]

Importantly, the court of appeals rejected NCUA's attempt to invoke that court's earlier decision in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989). *See* Pet. App. 25a. In *HWTC IV*, the court had held that the interests of hazardous waste treatment firms "were not sufficiently congruent with those of the intended beneficiaries of the [relevant EPA act]" to allow them to sue to force the EPA to adopt stricter environmental regulations. *Id.* 25a-26a. Concluding here that "this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC*," *Id.* 29a, the court of appeals held that respondents had standing to challenge the NCUA's actions and remanded for proceedings on the merits. Intervenors ATTF and Credit Union National Association, a credit union trade group, sought a writ of certiorari, but this Court denied the petition.[9/]

4. On remand, on cross-motions for summary judgment on the merits, the district court ruled that "the common bond provision was not the defining characteristic of a credit union,"

[8/] The court noted that this Court allowed investment firms or their trade association to enforce competitive restrictions imposed on banks by the Glass-Steagall Act and the McFadden Act, even though those statutes were not meant "to insulate investment bankers . . . from competition." Pet. App. 23a, *citing Clarke*, 479 U.S. at 388 & n.13; and *ICI*, 401 U.S. at 618-19.

[9/] *See AT&T Family Federal Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993).

Pet. App. 51a, and that "[t]he NCUA was given a mandate to provide more flexible and innovative regulation in the face of changing economic conditions." *Id.* 53a (internal quotations and citations omitted). It then upheld the NCUA's construction as a "reasonable construction of an ambiguous statute." *Id.* 54a.

On July 30, 1996, the court of appeals again reversed the district court. The court ruled that the common bond provision unambiguously requires that all the members of any one federal credit union must have a single common bond. This construction, the court found, is required by the text of the common bond requirement (which the NCUA's interpretation "would drain . . . of all meaning" Pet. App. 10a) and the Act's purpose "to unite credit union members in a cooperative venture." Pet. App. 12a (brackets and citations omitted). The court of appeals also concluded that the "common bond" requirement must be read consistently with the parallel clause relating to "community" credit unions, whose membership (NCUA agreed) is limited to a single community. Pet. App. 8a-9a. Thus, the statutory requirement that "credit union membership shall be limited to groups having a common bond of occupation . . . or to groups within a well-defined neighborhood, community, or rural district" would allow credit unions of either kind to include more than one group, but all of the constituent groups must share a single common bond of occupation or a single geographic community. The court accordingly found the NCUA's construction, under which a single occupational credit union could serve an unlimited

number of employer groups with disparate occupational bonds, to be impermissible. *Id.* 14a.[10/]

ARGUMENT

I. THE COURT OF APPEALS DECISION ON STANDING WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF THIS COURT'S DECISIONS.

The decision below was a routine and correct application of this Court's competitor standing jurisprudence. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) ("*Clarke*"); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Association of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150 (1970). The court of appeals held that respondents have standing under the doctrine set forth in *ICI* and *Clarke*, *see* Pet. App. 22a, and not because of any special circuit rule on standing. There is no live conflict between courts of appeals on competitor standing, and no new or important "standing" issue is presented.

[10/] The mandate of the court of appeals was expedited in light of statements by the NCUA that it would not follow the decision, and an injunction was entered by the district court on October 25 (modified slightly on October 31). Pet. App. 55a-65a. Subsequently, the district court enjoined *pendente lite* the implementation of a regulation issued by the NCUA, without public notice or comment, in response to the district court's action, 61 Fed. Reg. 59,305 (1996), on the ground that it was adopted in violation of the Administrative Procedure Act and "with specific intent to circumvent the terms of this Court's Orders." App. 1a. On December 24, the court of appeals stayed the district court's orders dated October 25 and 31 insofar as they may bar "enrolling new members of existing occupational groups" and refused other relief requested by the NCUA. App. 3a. The NCUA's statement, NCUA Pet. 13, that a motion is pending in the district court concerning "retroactive divestiture of [credit union] groups or members who do not share a common bond with the core group" is incorrect.

There is no dispute that respondents suffered actual injury and have constitutional standing. Pet. App. 20a. The issue below was whether, under this Court's "zone of interests" test for "prudential standing" to challenge agency action under the Administrative Procedure Act, banks have standing as competitors to enforce statutory limits on the activities on credit unions. The court of appeals answered that question "yes" in a straightforward application of *ICI* and *Clarke*.

In both of those cases, the Court held that trade associations of securities firms had prudential standing to challenge agency approvals of activities of commercial banks that allegedly violated the banking statutes. As NCUA's petition acknowledges, "In *Clarke*, this Court upheld the standing of the securities dealers because they were attempting to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by national banks." NCUA Pet. 18; *citing* 479 U.S. at 403. Similarly here, the banking industry respondents have standing to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by credit unions. The NCUA argues that this case is different because the purpose of the Federal Credit Union Act is "to promote the accessibility and growth of federal credit unions." NCUA Pet. 18. But that is not an answer to *Clarke* and *ICI*: The "common bond" requirement of the FCUA is explicitly a limit on credit union reach, just as the Glass-Steagall Act and the McFadden Act are limits on bank activities. The subject of this case is the delineation of those limits, just as *Clarke* and *ICI* concerned the delineation of similar limits in the banking laws.

Petitioners contend that this case lies outside *Clarke* and *ICI* because Congress did not say that the FCUA was intended to

protect banks. NCUA Pet. 16-17. But *Clarke* rejected exactly this argument:

> [In *ICI*] there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks. . . . [I]t was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398. *Clarke* went on to summarize the "zone of interests" test as *not* requiring any "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400.

The decision below is in accord with other reported decisions of the circuit courts on competitor standing that post-date *Clarke*,[11/] including a case involving FCUA standing issues identical to this one. *See Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1994). In particular, there is no live conflict with Fourth Circuit jurisprudence. Though

---

[11/] *See Scheduled Airline Traffic Offices v. DOD*, 87 F.3d 1356 (D.C. Cir. 1996); *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993) (out-of-state milk producers have competitor standing to challenge constitutionality of state milk pricing order); *DeLoss v. HUD*, 822 F.2d 1460 (8th Cir. 1987) (owners of rental property have competitor standing to challenge Department's decision, under § 202 of the Housing Act, to finance a housing project); *see also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co. ("VALIC")*, 513 U.S. 251 (1995) (implicitly finding that the insurance industry has competitor standing to challenge regulations allowing banks to sell insurance); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229, 233 (7th Cir. 1988) (alcoholic beverage retailers have standing to allege that BATF regulations unfairly constrained distributors in their dealings with retailers).

petitioners correctly state that *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), reached a contrary conclusion, that case was decided before *Clarke* and has not since been followed by the Fourth Circuit or any other Circuit on the competitor standing issue presented here. As the court of appeals stated, Pet. App. 24a n.3, *Branch Bank* did not survive *Clarke*; it was part of a line of cases, limiting standing to express beneficiaries of a statutory restriction, that was specifically overruled in *Clarke*. *See* 479 U.S. at 400 n.15.[12/]

Finally, nothing in the decision below suggests that it was based on a body of special D.C. Circuit doctrine that is "easier" than, or contrary to, *Clarke* and *ICI*. The court of appeals did discuss its "suitable challenger" test as elaborated in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989) (finding no standing to challenge agency action by a non-competitor who was not a "suitable challenger"). But the court was quite clear that its decision upholding standing in *this* case was based on *Clarke* and *ICI*. It went on to address "suitable challenger" because "appellees [petitioners here] . . . claim [it] was *stricter* than . . . *Clarke* . . . ." Pet. App. 26a (emphasis added). It found that test inapplicable and "the

---

[12/] The *Clarke* footnote refers to the line of cases exemplified by *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), on which *Branch Bank* specifically relied. *See* 786 F.2d at 625. In stating that it was overruling these cases, the *Clarke* Court said: "The [zone of interests] test is not meant to be especially demanding." 479 U.S. at 399. *Control Data* and other similar cases were rejected as being "inconsistent with our understanding of the 'zone of interests' test, as now formulated." *Id.* at 400 n.15.

paradigm of *ICI* and *Clarke*," controlling.[13] *See* Pet. App. 29a. It is quite inappropriate for petitioners now to suggest that the court of appeals followed an indulgent "suitable challenger" test rather than this Court's decisions in *Clarke* and *ICI*.

II. THE COURT OF APPEALS' INTERPRETATION OF THE COMMON BOND REQUIREMENT WAS DICTATED BY "TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION," WAS CORRECT, PRESENTS NO CONFLICT WITH OTHER CIRCUITS, AND RESOLVES A CONSTRUCTION QUESTION UNIQUE TO THIS STATUTE AND OF NO WIDER IMPORTANCE.

On the merits, the court of appeals properly applied the *Chevron*[14] test to an agency's revised interpretation of a non-technical statututory requirement. Employing the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9; *see Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990), and starting with the language of the statute, the court concluded that the new interpretation conflicted with an unambiguous statutory mandate. Its invalidation of NCUA's actions was wholly appropriate in light of that conclusion. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S.

---

[13] Although petitioners feign surprise, it is obvious why the court of appeals did not cite *Air Courier Conf. of Am. v. American Postal Workers Unions, AFL-CIO*, 498 U.S. 517 (1991): *Air Courier* was not a competitor standing case. In any event, what *Air Courier* says is this: "*Clarke* is the most recent in a series of cases in which we have held that competitors of regulated entities have standing to challenge regulations." *Id.* at 529. That is precisely what the court below held.

[14] *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"); *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter").

The provision at issue says, "Federal credit union membership shall be limited to groups having a common bond of occupation . . . ." Only two readings of this provision have been suggested. The court of appeals' reading fits the language and makes sense: a credit union may have members from one or more occupational groups as long as they all have "a" common bond that "simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8285 (1980). NCUA's current reading does not fit the language and makes no sense: a credit union may have members drawn from one or more groups, including "groups" of just one or two people, that need not share "a" common bond; on that reading every person in the United States who has a job with *any* employer (or has a family member who is employed) could be a member of the same federal credit union without violating the requirement, which, under this construction, serves no discernible purpose.

The court of appeals was also correct in concluding that the NCUA's current interpretation could not be made to fit the structure of the sentence in which the common bond requirement is set forth. That sentence states that federal credit union membership is restricted to (a) "groups having a common bond of occupation or association," *or* (b) "groups within a well-defined neighborhood, community, or rural district." The NCUA has always agreed that, while a community credit union may include plural "groups," all must necessarily share "a" — *i.e.*, one — community, or else the credit union could expand

to fill the map. The parallel phrasing similarly requires that, while an occupationally-defined credit union may contain plural "groups" (*i.e.*, from affiliated employers), all must share "a" — one — common bond.

Petitioners assert that the NCUA's policy "promotes the congressional purposes expressed in the [Act]," NCUA Pet. 22.[15/] But at best, "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Dimension Financial*, 474 U.S. at 373-74. And one of the purposes clearly expressed in the text and legislative history of this statute was to limit federal credit union membership to persons having certain relationships that Congress thought would enable them to trust and rely on each other. As the court of appeals ruled, NCUA simply prefers to leave that limiting purpose of the statute out of account.

Chevron does not call for deference to agency interpretations unless the court determines, after applying "traditional tools" to discern congressional intent, that the intent is unclear *and* concludes that the agency's construction is reasonable. *See, e.g., Smiley v. Citibank (South Dakota)*, N.A., __ U.S. __, 116 S. Ct. 1730 (1996); INS *v. Cardoza-*

[15/] The NCUA cites *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995) ("*VALIC*"), arguing that the NCUA's multiple-bond policy merely "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design." NCUA Pet. 22. Unlike *VALIC*, however, where the Comptroller of the Currency interpreted the phrase "all such incidental powers as shall be necessary to carry on the business of banking," this is not a case where an agency gave content to an open-ended provision. Here, the NCUA simply abandoned the reading dictated by language, context, and purpose in favor of a reading that renders the words at issue nugatory.

Fonseca, 480 U.S. 421, 447-48 (1987). Petitioners' problems are that the "traditional tools" — language and purpose of the provision — do dictate the answer here, and NCUA's interpretation is incorrect because it would deprive the "common bond" requirement of all substance.

The question presented is unique to the Federal Credit Union Act. The fact that credit unions are affected by the issue is not a reason for this Court to review the court of appeals' decision in the absence of a conflict. In just the last few weeks, courts of appeals have invalidated important regulations of a number of federal agencies as violative of unambiguous statutory mandates, including regulations affecting labor,[16/] Medicaid,[17/] and legal aliens.[18/] This Court of course does not routinely provide a second level of review in such cases.

Petitioners also argued below that a meaningful common bond provision would be inconsistent with today's realities, but Judge Ginsburg fully answered this argument: "if this [single-bond] conception of an FCU seems dated in the world of ATMs and nearly nationwide financial institutions of a scale surely unimaginable in 1934, . . . then the case for updating the FCUA

[16/] *See L.P. Cavett Co. v. United States Dep't of Labor*, No. 95-3902, 1996 WL 688966 (6th Cir. Dec. 3, 1996) (Department of Labor regulation implementing the Davis-Bacon Act).

[17/] *See Cabell Huntington Hosp., Inc. v. Shalala*, No. 95-3095, 1996 WL 682215 (4th Cir. Nov. 27, 1996) (HHS regulation regarding Medicare reimbursement); *Legacy Emanuel Hosp. and Health Ctr. v. Shalala*, 97 F.3d 1261 (9th Cir. 1996) (same).

[18/] *See Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1996) (INS regulation implementing the Immigration Act).

must be addressed to Congress."[19/] Respondents note that the policy issue before Congress would not be whether credit union services will be broadly available: they are universally available, through numerous state-chartered credit unions not affected by the decision below,[20/] as well as federal community credit unions and federal occupational and associational credit unions complying with the common bond requirement. The policy issue for Congress would be whether it wishes to permit federally chartered credit unions to add members across the nation without any common bond limitation. That is, as Judge Ginsburg said, not an issue for the courts.

Finally, there is no conflict between the decision below and any other appellate decision. The NCUA makes the extraordinary argument, NCUA Pet. at 29, that this Court should anticipate the possibility of a conflict with a case pending in the Sixth Circuit because the plaintiffs in that case might not choose to petition from an adverse decision. But *if* a conflict develops, and *if* thereafter petitioners lose *any* case, petitioners will be able to give this Court the opportunity to consider the issue. There is no reason to anticipate in this case a possible

---

[19/] Pet. App. 12a; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986):

> What is really troubling respondents, of course, is their sense that state regulators will not allow them sufficient revenues. While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute.

[20/] Federal credit unions operating in states that do not impose a common bond requirement for state-chartered credit unions may convert their charters, *see* 12 U.S.C. § 1771, and, if press reports are accurate, many have already taken steps toward doing so.

future conflict calling for this Court's attention when — on petitioners' own view of the matter — the issue will cease to arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
MICHAEL S. HELFER
CHRISTOPHER R. LIPSETT
ERIC MOGILNICKI
LEON B. GREENFIELD
JEFFREY S. JACOBSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Respondents

JOHN J. GILL III
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

Of Counsel

December 30, 1996

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 90-2948

FIRST NATIONAL BANK AND TRUST
COMPANY, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION
ADMINISTRATION, ET AL., DEFENDANTS

NO. 96-2312

AMERICAN BANKERS ASSOCIATION, ET AL.,
PLAINTIFFS,

v.

NATIONAL CREDIT UNION
ADMINISTRATION, DEFENDANTS

[Filed: December 4, 1996]

ORDER

In accordance with the proceedings in open court at the status conference and motions hearing of December 4, 1996, and upon consideration of the record before the Court, the Court having found, for essentially the reasons set forth by plaintiffs and those expressed orally by the Court, that defendant National Credit Union Administration ("NCUA") adopted its recently promulgated regulation of November 14, 1996, entitled Interim Field of Membership Policy ("IRPS") 96-2, collusively with co-defendant intervenors; in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*; and with specific intent to circumvent the terms of this Court's Orders of October 25, 1996, and October 31, 1996, it is, this 4th day of December, 1996,

ORDERED, that plaintiffs' motion for immediate enforcement of the Court's Orders of October 25, 1996, and October 31, 1996, is granted, and any further implementation of IRPS 96-2, is enjoined, *pendite lite*, or subsequent order of Court; and it is

FURTHER ORDERED, that any approval henceforth of requests for occupational federal credit union membership made pursuant to NCUA's purported redefinition of "core membership" or "common occupational bond," *see* IRPS 96-2, other than as defined by the Order of October 31, 1996, including further implementation of the 31 requests reportedly already approved by NCUA pursuant to the agency's new policy, are enjoined, *pendite lite*; and it is

FURTHER ORDERED, that plaintiffs' request for an expedited Rule 16 conference is denied as moot; and it is

FURTHER ORDERED, that the motions of defendant and defendant intervenors for a stay or, in the alternative, a partial stay, pending appeal of the Court's Orders of October 25 and October 31, 1996, and possible Supreme Court review of *First*

National Bank and Trust Co. v. National Credit Union Adm'n, 90 F.3d 525 (D.C. Cir. 1996), is denied; and it is

FURTHER ORDERED, *sua sponte*, that a stay of this Order pending appeal is denied; and it is

FURTHER ORDERED, that counsel for all parties furnish courtesy copies to this Court of all papers filed in the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court in connection with these cases, and keep this Court apprised of significant action thereon; and it is

FURTHER ORDERED, that these cases are scheduled for an initial status and scheduling conference pursuant to Fed. R. Civ. P. 16 and D.D.C. Rule 206 on January 29, 1996, at 9:30 a.m.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 96-5347
CONSOLIDATED WITH 96-5348, 96-5349, 96-5350,
96-5351, 96-5352

PIEDMONT STATE BANK, ET. AL.,
APPELLEES

v.

NATIONAL CREDIT UNION
ADMINISTRATION, ET AL., APPELLEES

NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS,
APPELLANT

BEFORE: Ginsburg, Sentelle, and Rogers, Circuit Judges

[Filed December 24, 1996]

ORDER

Upon consideration of the motions to stay, the alternative motions for a partial stay, the opposition to the motions to stay, and the replies to the opposition, it is

ORDERED that so much of the October 25, 1996 and October 31, 1996 district court orders that bar a credit union from enrolling new members of existing occupational groups that do not share a common occupational bond with the credit union's core membership, be stayed pending appeal, or resolution of the petitions for *certiorari* filed by the National Credit Union Administration and the AT&T Family Federal Credit Union in the United States Supreme Court in the matter of *First National Bank and Trust Co. et al. v. National Credit Union Admin.*, 90 F.3d 525 (D.C. Cir. 1996), *petitions for cert. filed*, 65 U.S.L.W. 3416 (U.S. Nov. 26, 1996) (No. 96-843) and (U.S. Nov. 27, 1996) (No. 96-847). To the extent that the movants seek to stay other aspects of the district court's orders, their motions are denied. It is

FURTHER ORDERED, on the court's own motion, that the parties file motions to govern further proceedings herein within fourteen days of the Supreme Court's resolution of the petitions for *certiorari*.

/s/ Mark J. Langer
FOR THE COURT:
Mark J. Langer, Clerk